

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Brooke Lewis	Team: Bias Squad #01	CCRB Case #: 202207290	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Friday, 10/01/2021 5:43 PM, Thursday, 10/27/2022 2:30 PM	Location of Incident: Bay Street and Fingerboard Road	18 Mo. SOL 4/27/2024	Precinct:		
Date/Time CV Reported Thu, 10/27/2022 3:02 PM	CV Reported At: Mayor's Office	How CV Reported: On-line website	Date/Time Received at CCRB Fri, 10/28/2022 10:25 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. PO Joah Pagan	18733	943643	120 PCT

Officer(s)	Allegation	Investigator Recommendation
A. PO Joah Pagan	Abuse: On October 1, 2021, at the intersection of Bay Street and Fingerboard Road in Staten Island, Police Officer Joah Pagan took law enforcement action based upon actual or perceived race.	
B. PO Joah Pagan	Abuse: On October 27, 2022, Police Officer Joah Pagan provided a false official statement against § 87(2)(b) during a virtual court hearing.	

## Case Summary

On October 27, 2022, § 87(2)(b) filed this complaint via the NYC Mayor's Office's website. This complaint was received at the CCRB on October 28, 2022.

On October 1, 2021, at approximately 5:43 PM, § 87(2)(b) was driving down Bay Street, a single-lane road in Staten Island, when she passed approximately three vehicles stopped at the intersection of Bay Street and Fingerboard Road on the right-hand side. Officer Joah Pagan stopped § 87(2)(b) vehicle and issued her a summons for unsafe passing. § 87(2)(b) a Black woman, alleged that PO Pagan was racist because two other vehicles passed on the right-hand side immediately behind her and were not stopped. **(Allegation (A): Biased Policing, § 87(2)(g)**

On October 27, 2022, at approximately 2:30 p.m., PO Pagan and § 87(2)(b) provided testimony at a virtual hearing regarding the summons that § 87(2)(b) received on October 1, 2021. At the hearing, PO Pagan falsely testified that on October 1, 2021, PO Pagan observed § 87(2)(b) drive on the sidewalk and that another driver stopped and thanked him for stopping § 87(2)(b) vehicle. **(Allegation (B): Abuse of Authority, § 87(2)(g)**

On November 15, 2022, CCRB Executive Director Jonathan Darche granted the request to investigate the late filed complaint regarding the October 1, 2021 incident. **(Board Review 21).**

The investigation obtained body-worn camera footage depicting the October 1, 2021, incident. **(Board Review 5).**

## Findings and Recommendations

**Allegation (A) Biased Policing: On October 1, 2021, at the intersection of Bay Street and Fingerboard Road, Police Officer Joah Pagan took law enforcement action based upon actual or perceived race.**

On November 17, 2022, § 87(2)(b) provided an official sworn statement to the investigation. In her Confidential Witness Information Sheet, § 87(2)(b) identified herself as a forty-five-year-old Black woman. **(Board Review 14).**

On October 1, 2021, at a time determined by the investigation to be 5:43 PM, § 87(2)(b) was driving on Bay Street, a single-lane road in Staten Island, when she observed approximately three vehicles stopped at an intersection. Believing the vehicles were stopped because they were waiting to turn left onto Fingerboard Road, § 87(2)(b) proceeded to pass the vehicles by driving on the right-hand side of Bay Street, which she believed she had a right to do. There were no bicycle lanes or sidewalks on the right side of Bay Street. § 87(2)(b) drove through the intersection while the traffic light was green. Soon after driving through the intersection, § 87(2)(b) vehicle was stopped by PO Pagan, who was on patrol in a vehicle. PO Pagan asked § 87(2)(b) to provide her identification, which § 87(2)(b) did. § 87(2)(b) did not recall whether PO Pagan said anything about the reason her vehicle was stopped. PO Pagan took § 87(2)(b) identification back to his vehicle and when he returned to § 87(2)(b) he issued her a summons for violating VTL 1122(A) [concerning overtaking a vehicle on the left]. **(Board Review 3).**

§ 87(2)(b) believed PO Pagan was racist because two other drivers passed on the right-hand side of Bay Street immediately behind her and were not stopped. § 87(2)(b) was unable to see the

physical features of the two drivers, but believed the drivers were white given that they were not stopped by PO Pagan. **(Board Review 3).**

On February 23, 2023, the investigation obtained an official sworn statement from PO Pagan. On October 1, 2021, PO Pagan was working for the Citywide Traffic Taskforce, an assignment that involved responding to collision prone locations and taking enforcement action against hazardous moving vehicle violations. PO Pagan stated that Bay Street is known for unsafe passing and is a collision prone location within the 120<sup>th</sup> Precinct, although the specific intersection of Bay Street and Fingerboard Road is not.

Per PO Pagan's testimony, on October 1, 2021, at approximately 5:43 PM, he was in an unmarked police vehicle stopped in traffic at the intersection of Bay Street and Fingerboard Road, when he observed § 87(2)(b) vehicle pass on the right-hand side at approximately forty miles per hour, where the speed limit is 25 miles-per-hour. Bay Street is a single-lane road and there was "barely enough room for a car to fit" between PO Pagan's vehicle and the sidewalk abutting Bay Street. As § 87(2)(b) vehicle approached the intersection, the traffic began moving forward, and § 87(2)(b) "cut in front" of vehicles passing through the intersection. At this time, PO Pagan activated his police lights and siren and stopped § 87(2)(b) vehicle. PO Pagan had not yet observed any physical characteristics of § 87(2)(b). Upon stopping § 87(2)(b) vehicle, PO Pagan asked § 87(2)(b) to provide her license and registration, and then issued her a summons for violating VTL 1122(A). PO Pagan declined to issue a summons for speeding because he did not have his laser gun to verify § 87(2)(b) speed, and therefore, the summons would be difficult to defend in court. As PO Pagan stood outside his vehicle, another driver stopped his vehicle and thanked PO Pagan for stopping § 87(2)(b) because drivers do what § 87(2)(b) did "all the time." PO Pagan had not observed any other vehicles passing unsafely at the intersection of Bay Street and Fingerboard Road, other than § 87(2)(b) on the incident date. **(Board Review 4).**

The investigation obtained the BWC footage of PO Pagan, in which a portion of § 87(2)(b) vehicle is depicted passing on the right-hand side of PO Pagan's vehicle. There are no other vehicles depicted passing on the right either before or after § 87(2)(b). **(Board Review 5).** The investigation was unable to obtain video surveillance footage from the Mobil Gas Station located at the intersection of Bay Street and Fingerboard Road. **(Board Review 15).**

The investigation obtained a digital copy of the summons issued to § 87(2)(b) on October 1, 2021. **(Board Review 6).** However, the investigation was unable to obtain the original handwritten summons, including PO Pagan's handwritten notes, because it is no longer in the NYPD's system. **(Board Review 2).**

On December 2, 2022, the investigation submitted a request for the transcript of the virtual court hearing held on October 27, 2022. As of the date of the submission of this report, the request is pending. **(Board Review 20).**

NYPD Administrative Guide Section 304-17: Department Policy Prohibiting Racial Profiling and Bias-Based Policing **(Board Review 19)** defines racial profiling as "a decision to initiate [law] enforcement action against a person [that] is motivated even in part by a person's actual or perceived race, color, ethnicity or national origin, . . . unless the officer's decision is based on a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics or information."

Race does not have to be the sole, primary, or predominant motivation for the law enforcement action in question in order to substantiate an allegation of racially biased policing. Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 265 (1977) (**Board Review 23**); United States v. City of Yonkers, 96 F.3d 600, 611-12 (2d Cir. 1996) (**Board Review 24**); Floyd v. City of New York, 959 F.Supp.2d 540, 571 (S.D.N.Y. 2013) (**Board Review 25**). If the preponderance of the evidence establishes that the civilian’s race played any role in the officer’s decision making, the racial profiling allegation should be substantiated, regardless of any non-discriminatory reasons the officer gives for their actions. Yonkers, 96 F.3d at 612; Raza v. City of New York, 998 F.Supp.2d 70, 79-80 (E.D.N.Y. 2013) (**Board Review 26**); Bennett v. Health Sys., Inc., 92 A.D.3d 29, 40 (1st Dep’t 2011) (**Board Review 27**).

Because racially discriminatory intent “is rarely susceptible to direct proof,” it is often established through circumstantial evidence. Millan-Hernandez v. Barr, 965 F.3d 140, 148 (2d Cir. 2020) (**Board Review 28**); Bennett, 92 A.D.3d at 40-41. However, rarely is one piece of circumstantial evidence sufficient on its own to establish racially discriminatory intent. The factfinder must instead consider the “totality of the relevant facts.” Washington v. Davis, 426 U.S. 229, 242 (1976) (**Board Review 29**); Leblanc-Sternberg v. Fletcher, 67 F.3d 412, 425 (2d Cir. 1995) (**Board Review 30**). Examples of circumstantial evidence to consider include, but are not limited to:

- (i) the sequence of events leading up to the law enforcement actions at issue;
- (ii) the officer’s departure from their own and/or their fellow officers’ customary practices during the incident in question;
- (iii) officer’s violation of law and/or department policies and procedures during the incident in question
- (iv) the falsity of the officer’s non-discriminatory explanations for their actions
- (v) the officer’s selective enforcement of the law against the complainant but not against an individual from another demographic group engaged in the same behavior
- (vi) data showing a pattern of racial disparities in the officer’s enforcement activity over time;
- (vii) officer history of prior biased acts or similar misconduct committed against persons from the complainant/victim’s racial/ethnic group.

*(i) sequence of events leading up to the law enforcement actions at issue*

The United States Supreme Court has held that when analyzing claims of racial discrimination, “[t]he specific sequence of events leading up to the challenged decision [] may shed some light on the decisionmaker’s purposes.” Village of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. at 267 (**Board Review 23**). The events leading up to a challenged law enforcement action, in combination with other circumstantial evidence, can support a finding that the officer who took the action was motivated by racial discrimination. *See, e.g.*, Rodriguez v. Barr, 943 F.3d 134, 142-43 (2d Cir. 2019) (**Board Review 34**); Ballew v. City of Pasadena, 2022 U.S. Dist. LEXIS 233385, \*21-22 (C.D. Cal. Nov. 23, 2022) (**Board Review 35**); Commonwealth v. Long, 152 N.E.3d 733, 739-40 (Mass. 2020) (**Board Review 36**); Marshall v. Columbia Lea Reg’l Hosp., 345 F.3d 1157, 1169 (10th Cir. 2003) (**Board Review 37**). Specifically, evidence that an officer knew an individual’s race before stopping the individual supports an inference that the individual’s race may have played a role in the officer’s decision to conduct the stop. *See* Marshall, 345 F.3d at 1169; Ballew, 2022 U.S. Dist. LEXIS 233385 at \*20-22; Long, 152 N.E.3d at 740 n.9.

As discussed above, PO Pagan testified that he did not see § 87(2)(b) physical characteristics,

(and thus did not know her race) prior to pulling her over. PO Pagan's testimony is corroborated by the video of the incident captured on his BWC, which shows § 87(2)(b) car pass PO Pagan's police vehicle so quickly that there was not enough time to observe the physical characteristics of the driver (**Board Review 5, Timestamp 00:33**). However, PO Pagan did know § 87(2)(b) race at the time he exercised his discretion to issue her a summons rather than just giving her a warning for violating VTL 1122(A).

*(ii) Officer's departure from customary practices*

A government official's, including a police officer's, departure from their or their agency's customary practices in a given situation can support a finding that those officials acted with racially discriminatory intent. Village of Arlington Heights, 429 U.S. at 267; Moore v. MTA, 999 F.Supp.2d 482, 497-98 (S.D.N.Y. 2013) (**Board Review 38**); Doe v. Village of Mamaroneck, 462 F.Supp.2d 520, 548-49 (S.D.N.Y. 2006) (**Board Review 39**). For example, "traffic stops initiated by officers whose primary assignment does not involve the enforcement of traffic laws might warrant particular scrutiny" for possible racially discriminatory motive. Long, 152 N.E.3d at 740 n.8. Similarly, an officer's failure to question or ticket a driver regarding the traffic infraction for which the driver was stopped can support a finding that the traffic violation was used as pretext to stop the driver's vehicle for a different, improper purpose. People v. Roundtree, 234 A.D.2d 612, 613 (2d Dep't 1996) (**Board Review 40**).

§ 87(2)(g) PO Pagan was working a traffic enforcement assignment at the time he stopped § 87(2)(b) and summonsed her for the traffic violation that he observed her commit and pulled her over for, § 87(2)(g)

*(iii),(iv) Officer's violation of law and/or NYPD Policy and falsity of officer's non-discriminatory explanation for his actions*

The fact that a law enforcement action was taken in violation of the law (e.g., traffic stops made without probable cause) can, in combination with other circumstantial evidence, support a finding that such action was racially motivated. Rodriguez v. Barr, 943 F.3d at 143; Millan-Hernandez v. Barr, 965 F.3d 140, 147-49 (2d Cir. 2020); Feliz v. City of N.Y., 2022 U.S. Dist. LEXIS 26129, \*28 (S.D.N.Y. Feb. 14, 2022) (**Board Review 41**). Similarly, actions taken in violation of police department policy may suggest that the subject officer acted with a discriminatory purpose. See Rodriguez, 943 F.3d at 142; Long, 152 N.E.3d at 740 n.12.

In New York State vehicle stops "are lawful only when (i) based on probable cause that a driver has committed a traffic violation; (ii) based on a reasonable suspicion that the driver or occupants of the vehicle have committed, are committing, or are about to commit a crime; OR (iii) conducted pursuant to nonarbitrary, nondiscriminatory, uniform highway traffic procedures" (e.g., a DUI or vehicle safety inspection checkpoint). People v. Hinshaw, 35 N.Y.3d 427, 430 (2020). (**Board Review 31**).

VTL 1122(a) states: "The driver overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle." (**Board Review 7**).

It is undisputed that § 87(2)(b) passed on the right-hand side of Bay Street, a single-lane road.

§ 87(2)(g)

*(v) Selective enforcement*

A law enforcement action that is otherwise legally justified (e.g., a vehicle stop supported by probable cause of a traffic violation) can still constitute racial profiling if the officer was motivated at least in part to take the action by the civilian's actual or perceived race. *See PBA v. City of N.Y.*, 142 A.D.3d 53, 66-67 (1st Dep't 2016) (**Board Review 33**); *Raza*, 998 F.Supp.2d at 79; *Floyd*, 959 F.Supp.2d at 667. (**Board Review 25**). Thus, an officer's taking law enforcement action against a member of a particular demographic group but not against a member of another demographic group engaged in similar behavior can be strong evidence that the action was racially motivated. *See Floyd v. City of New York*, 959 F.Supp.2d at 633; *PBA v. City of N.Y.*, 142 A.D.3d at 66-67; *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) (**Board Review 42**).

§ 87(2)(g) § 87(2)(b) testified that two other vehicles also passed on the right-hand side of Bay Street immediately after her, § 87(2)(g)

*(vi), (vii) data on patterns of racial disparity in officer's enforcement activity and officer's history of prior biased acts or similar misconduct*

Data showing a pattern of racial disparities in a police officer's enforcement activity over time are widely recognized as important circumstantial evidence to consider in a "totality of the relevant facts" analysis of an allegation of racial profiling against that officer. *See, e.g., Marshall*, 345 F.3d at 1168; *Anderson v. Cornejo*, 284 F.Supp.2d 1008, 1050 (N.D. Ill. 2003); *U.S. v. Hare*, 308 F.Supp.2d 955, 992 (D. Neb. 2004); *Johnson v. Holmes*, 782 Fed.Appx. 269, 281-82 (4th Cir. 2019); *Long*, 152 N.E.3d at 739-40; *Ballew*, 2022 U.S. Dist. LEXIS 233385 at \*22-25 (**Board Review 35**). Additionally, "proof of prior discriminatory conduct" by an alleged discriminator against members of the complainant's demographic group "is relevant to their motive and intent at the time of the acts at issue here," *Open Housing Ctr v. Kings Highway Realty*, 1993 U.S. Dist. LEXIS 15927, \*18-21 (E.D.N.Y. Nov. 8, 1993) (**Board Review 43**), especially if the prior conduct "is similar in nature to that experienced by the [complainant]." *Zubulake v. UBS Warburg, LLC*, 382 F.Supp.2d 536, 544. (S.D.N.Y. 2005) (**Board Review 44**); *Todaro v. Siegel, Fenchel & Peddy, P.C.*, 2008 U.S. Dist. LEXIS 17894, \*13 (S.D.N.Y. Mar. 3, 2008) (**Board Review 45**).

The investigation could not fully evaluate whether there was circumstantial evidence of discriminatory intent on the part of PO Pagan with regards to the allegations of biased policing due to the NYPD's refusal to release data and information that may have enabled an identification of (1) a pattern of disparities in PO Pagan enforcement activity over time, and (2) a history of biased behavior and/or similar misconduct towards individuals from the complainant's actual or perceived demographic group. Specifically, requests for PO Pagan's prior IAB racial profiling/biased policing complaint histories, Adverse Credibility Committee decisions, NYPD Equal Employment Opportunity Division complaints and decisions, and performance evaluations, as well as data on PO Pagan's VTL tickets for the prior year, and the same data for similarly situated officers, were submitted to the NYPD on November 16, 2022 and January 12, 2023, and were rejected without explanation on November 28, 2022 and January 20, 2023, respectively.



This refusal to provide the requested data and information is in contravention of the NYPD's own guidance for investigating profiling and biased complaints. Specifically, the NYPD's Internal Affairs Bureau Guide Procedure No.620-58: Processing and Investigating Complaints of Profiling and Bias-Based Policing directs investigating officers to "review subject officers' CPI, including prior civilian complaints, whether substantiated or not, disciplinary records, when appropriate, lawsuits filed against the subject officer, and prior performance evaluations with an eye towards identifying patterns of bias / misconduct on the part of the subject officer." (**Board Review 18**). In addition, the IAB Training Unit's internal investigator training course on "Profiling and Bias-Based Policing" instructs IAB and Borough investigators that they should "review enforcement activity of accused MOS as well as his/her complaint history – look for patterns of bias/misconduct" and that "patterns or trends in [an] officer's enforcement activity" is circumstantial evidence of bias. (**Board Review 17**).

*(viii) Summary of evidence and recommended disposition*

§ 87(2)(g)

**Allegation (B) Abuse of Authority: On October 27, 2022, Police Officer Joah Pagan provided a false official statement against § 87(2)(b) during a virtual court hearing.**

§ 87(2)(b) testified that on October 27, 2022, she attended a virtual court hearing regarding the summons she received from PO Pagan on October 1, 2021. During the hearing, PO Pagan testified that he had been driving straight on Bay Street when he observed § 87(2)(b) pass on the right-hand side, onto the abutting sidewalk. PO Pagan also testified that another driver had stopped and thanked him for stopping § 87(2)(b). § 87(2)(b) testified during the hearing that she did not drive onto the sidewalk and that PO Pagan was lying. The judge overseeing the hearing found § 87(2)(b) guilty of the infraction and ordered her to pay a two hundred and thirty-eight dollar fine. (**Board Review 3**).

PO Pagan testified that on October 27, 2022, he attended a virtual court hearing regarding the summons he issued § 87(2)(b) on October 1, 2021. During the hearing, PO Pagan gave testimony based upon the notes he had written on the summons he issued to § 87(2)(b). PO Pagan did not testify that § 87(2)(b) had driven on the sidewalk when passing on the right-hand side of Bay Street. PO Pagan also testified that another driver had thanked him for stopping § 87(2)(b) vehicle. (**Board Review 4**).

PO Pagan's BWC footage begins from the time he is inside his vehicle and observing § 87(2)(b) pass on the right and ends at the time he has reentered his vehicle after completing the stop and issuing § 87(2)(b) a summons. The footage does not depict a view of the street as § 87(2)(b) passes on the right, so it is not instructive as to whether § 87(2)(b) drove onto the sidewalk. The BWC footage does not depict anyone interacting with or thanking PO Pagan for stopping § 87(2)(b) vehicle. (**Board Review 5**).

On December 2, 2022, the investigation submitted a request for the transcript of the virtual hearing held on October 27, 2022. As of the date of the submission of this report, the request is pending. (**Board Review 20**).

No documentation obtained by the investigation—including the summons (**Board Review 6**) or PO Pagan’s memo books from October 1, 2021, and October 27, 2022 (**Board Review 22**)—contain any notation of § 87(2)(b) driving onto the sidewalk or another driver thanking PO Pagan.

NYPD Patrol Guide Procedure 304-10, *False or Misleading Statements*, prohibits officers from making “an intentional statement that [the officer] knows to be untrue, which is material to the outcome of an investigation proceeding or other matter in connection with which the statement is made.” A statement is generally “material” when it “tends to support and give credit to the witness in respect to the main fact[.]” People v. Perino, 19 N.Y. 3d 85, 89 (2012) (**Board Review 8, Board Review 32**).

§ 87(2)(b) alleged that PO Pagan made two false statements during the October 27, 2022, hearing: (1) that § 87(2)(b) drove onto the sidewalk; and (2) that another driver had thanked PO Pagan for stopping § 87(2)(b) vehicle. Both statements are material because they bolster the credibility of PO Pagan’s testimony as to the main fact that § 87(2)(b) was passing unsafely on the right-hand side of Bay Street.

As to the first statement, PO Pagan testified to the investigation that he did not observe § 87(2)(b) driving on the sidewalk on October 1, 2021, and did not provide testimony at the hearing stating that she drove on the sidewalk on October 27, 2022. § 87(2)(g)

As to the second statement, in their testimony to the CCRB, both § 87(2)(b) and PO Pagan agreed that PO Pagan testified at the October 27, 2022, court hearing that a driver had thanked him for stopping § 87(2)(b) vehicle. Because it is undisputed that PO Pagan testified that another driver thanked him for stopping § 87(2)(b) § 87(2)(g)

In his testimony to the investigation regarding the October 1, 2021, incident, PO Pagan stated that as he was standing outside his vehicle, another driver stopped behind him. PO Pagan stated he then turned around and the driver thanked him for stopping § 87(2)(b). Given that the BWC footage depicts the entirety of the stop, including from the time PO Pagan is inside his vehicle before § 87(2)(b) passes on the right until the time at which PO Pagan has re-entered his vehicle after issuing the summons and concluding the stop, and no driver is depicted stopping and interacting with PO Pagan, § 87(2)(g)

§ 87(2)(g)

#### Civilian and Officer CCRB Histories

- This is the first CCRB complaint to which § 87(2)(b) has been a party.
- PO Pagan has been a member of service for 16 years and has been a subject in 8 CCRB



complaints and 16 allegations, none of which were substantiated. § 87(2)(g)

**Mediation, Civil, and Criminal Histories**

- This complaint was not suitable for mediation.
- As of March 27, 2023, the New York City Office of the Comptroller has no record of a Notice of Claim being filed in regards to this incident (**Board Review 11**).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

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Squad: Bias 1

Investigator: Brooke Lewis Inv. Atty. Brooke Lewis 05/16/2023  
Signature Print Title & Name Date

Squad Leader: Carlmais Johnson IM Carlmais Johnson 06/24/2023  
Signature Print Title & Name Date

Reviewer: Darius Charney RPBP Dir. Darius Charney 06/28/2023  
Signature Print Title & Name Date